v. *State*, 165 Md. 155, 167 Atl. 60 (1933), and the Texas Court of Criminal Appeals has declared that it has no power to correct a verdict. *Smith* v. *State*, 109 Tex. Cr. App. 667, 6 S.W. (2d) 762 (1928).

The only court which has considered the constitutionality of an appellate court's modifying a verdict is the Wyoming Court in *State* v. *Sorrentino*, 36 Wyo. 111, 253 Pac. 15 (1927). The defendant claimed that instead of having to accept a modified verdict, he was constitutionally entitled to a new trial, the court answered this by saying that among the facts found by the jury in returning a verdict of guilty of murder were all the facts necessary to sustain a verdict of guilty of manslaughter. Though the defendant had a right to have a jury pass on the facts once, he did not have the right to have another jury go over the same facts. The court adopted the reasoning of *State* v. *Freidrich*, 4 Wash. 205, 29 Pac. 1055 (1892), that the difference between the degrees of crime was a matter of law, and thus it was a proper matter for the consideration of the appellate courts.

English appellate courts have exercised substantially the same power as that granted the Ohio courts by the statute in question since the passage of the Criminal Appeals Act in 1907. 7 Edw. 7, c. 23.

The attitude of the Wyoming court toward the question of the constitutionality of the power to modify a verdict seems to be sound in law and desirable in the light of the practical consideration of preventing unnecessary retrials.

ROBERT B. GOSLINE.

CONTRACTS

INFANTS' CONTRACTS—LIABILITY OF INFANT FOR DAMAGES CAUSED BY BREACH OF CONTRACT TO LEASE.

A ten-months' lease for a summer cottage was executed by infant lessees for a total sum of $135, of which $45 was paid down, the remainder being payable later. They failed to make payment as promised and notified the lessor that they were not of age and asked for the return of their $45. This request was refused and the infant lessees brought this action for the amount paid. Defendant counter-claimed for the damage suffered by reason of her inability to rent her property. *Held:* Counter-claim disallowed; plaintiffs are entitled to recover the full amount which they had paid in advance. *Hewitt* v. *Klein, et al.*, 47 Ohio App. 40 Ohio L.R. 347, 355 (1933).

It is well established law that an infant is bound by contracts for necessaries. Whether the particular thing in dispute constitutes a neces-

sary is often a difficult question, but once determined the rule is clear. *Moskow* v. *Marshall*, 271 Mass. 302, 171 N.E. 477 (1930); *Sims* v. *Gunter*, 201 Ala. 286, 78 So. 62 (1918); *Arkansas Reo Motor Car Co.* v. *Goodlett*, 163 Ark. 35, 258 S.W. 975 (1924); *J. G. Pierce Co.* v. *Wallace*, 251 Mass. 383, 146 N.E. 658 (1925); *Wilkins* v. *Cockran*, 24 Ohio App. 408, 157 N.E. 494 (1926). While the leasing of a house by an infant has been considered as a necessary, *Gregory* v. *Lee*, 64 Conn. 407, 30 Alt. 53, 27 L.R.A. 618 (1894), the renting of a summer cottage, without a showing of special circumstances, could hardly come within the scope of the term.

Contracts other than those for necessaries are voidable at the election of the infant. There is a split of authority as to whether estoppel is applicable to infants making fraudulent representations as to their age. The weight of authority hold that fraudulent representations as to age, in cases based on contract, will not raise an estoppel against an infant. *Sims* v. *Everhard*, 102 U.S. 300, 26 L.Ed. 87 (1880); *Tobin* v. *Spann*, 85 Ark. 556, 109 S.W. 534, 16 L.N.S. 672 (1908); *Arkansas Reo Motor Car Co.* v. *Goodlett*, 163 Ark. 35, 258 S.W. 975 (1924); *Raymond* v. *General Motorcycle Co.*, 230 Mass. 54, 119 N.E. 359, 6 A.L.R. 420 (1918). The reason underlying this rule is the protection of the infant against himself. To apply an estoppel against him is but an indirect way of enforcing the contract. *Carolina, etc., Loan Association* v. *Black*, 119 N.C. 323, 25 S.E. 975 (1896). There is another line of authority which holds that estoppel is applicable to infants who misrepresent their age, and this is especially true when the infant is near majority and appears to a cautious person to be of age. *Commander* v. *Brazil*, 88 Miss. 668, 41 So. 497 (1906); *Hood* v. *Duren*, 33 Ga. App. 203, 125 S.E. 787 (1924); *La Rosa* v. *Nichols*, 92 N.J. 375, 105 Atl. 201 (1918); *Guidry* v. *Davis*, 6 La. Ann. 90 (1851).

The right of the adult to counterclaim for damages suffered by virtue of deterioration caused by the use of the property when the infant repudiates the contract and brings an action for the amount that has been paid is a controverted question. The cases that are in point mainly relate to the sale of personal property rather than the leasing of real property. There is respectable authority holding that an infant upon disaffirming the contract for the purchase of personal property, and upon returning or tendering back the property, may recover what he paid, without a deduction for the deterioration caused by the use of the article. *Summit Auto Co.* v. *Jenkins*, 20 Ohio App. 229, 153 N.E. 153, 240 L.R. 392 (1925); *Reynolds* v. *Garber Buick Co.*, 183 Mich.

157, 149 N.W. 985, L.R.A. 1915C 362 (1914); *McCarthy* v. *Henderson*, 138 Mass. 310 (1885).

A growing view is that adopted by the Federal Court and several State Courts to the effect that the seller may retain an amount which will compensate him for the depreciation in value of the article due to the infant's use or abuse, which amount cannot exceed the sum paid in advance by the infant. *Mestetzko* v. *Elf Motor Co.*, 119 Ohio St. 575, 165 N.E. 93 (1929); *Myers* v. *Hurley Motor Co.*, 273 U.S. 18, 71 L.Ed. 515, 50 A.L.R. 1181, 47 S. Ct. 277 (1927); *Rich* v. *Butler*, 160 N.Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 303, 55 N.E. 275 (1899); *Garther* v. *Wallingford*, 101 Or. 389, 200 P. 910 (1921).

It appears that the courts, in deciding cases relating to the counterclaim of the seller, do not give him damages unless there is something positive that has occurred such as deterioration caused by the use of the article by the infant. Consequently, the lessor in the principal case was rightly denied damages arising out of his inability to lease promptly to another when the infant lessees took advantage of their privilege to rescind.

NOAH J. KERN.

DOMESTIC RELATIONS

GROUNDS FOR DIVORCE—DESERTION AS GROSS NEGLECT OF DUTY—EPILEPTIC SPOUSE.

The plaintiff filed her petition for divorce charging extreme cruelty. The defendant cross-petitioned alleging gross neglect of duty. The defendant was an epileptic and plaintiff had become quite proficient in caring for him. Two months after she left him she began this action. The Supreme Court of Ohio affirmed the decree granting the defendant the divorce holding that the desertion under the circumstances constitute gross neglect of duty. *Porter, Ex'r.* v. *Lerch*, 129 Ohio St. 47, 193 N.E. 766 (1934).

Failure or neglect to perform marital duties is an element in gross neglect. There is some authority that this alone is sufficient to constitute the cause of action. *Lee* v. *Lee*, 132 Pac. 1070 (Okl., 1913). The court there held that a substantial failure of a husband to provide suitably for his wife's support when he is able to do so is gross neglect of duty. It is to be noted that the husband's ability to provide was a circumstance. The query as to whether it is a substantial factor is answered in *Nail* v. *Nail*, 2 Ohio Dec. (Rep.) 501 (1861), where the court